shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law. *Colo. Const. art. 6, § 2(1).*

The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law. *Colo. Const. art. 6, § 9(1).*

There is hereby created the court of appeals, pursuant to section 1 of article VI of the state constitution. The court of appeals shall be a court of record. Judges of the court of appeals may serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court. *C.R.S. § 13-4-101* (Source: L. 62: Entire article R&RE, effective January 12, 1965, see L. 63, p. 1049).

(C.R.S. § 13-4-102 is reproduced in the Exhibits.)

CONSIDERATIONS UNIQUE TO ISSUANCE OF AN EXTRAORDINARY WRIT

If the Colorado Supreme Court acted without lawful jurisdiction, it is unlikely that any Colorado court will disregard its actions as the law requires, absent action from this court.

STATEMENT OF THE CASE

This Petition appeals the judgment in *Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005) (per curiam)*, wherein justices of the Colorado Supreme Court purported to decide an appeal in a tort case in which they were defendants in their individual capacity. As eighteen other judges were specifically authorized by statute to hear said appeal and facially independent with respect to the matter, that court's actions violated Appellant Smith's Fourteenth Amendment right to due process of law. *Tumey v. Ohio, 273 U.S. 510 (1927).*

Inexplicably, that court affirmed a state district court decision declaring that it did not have jurisdiction to hear federal civil rights claims or facial challenges to a statute grounded in federal law brought on a timely basis by a party with standing to bring them. This is plain error. *Claflin v. Houseman, 93 U.S. 130 (1876).*

This matter further implicates the disturbing practice, as decried by four of the Justices in *Roper v. Simmons, 543 U.S. 551 (2005)*, of lower courts' unabashed refusal to follow the controlling decisions of this Court. Especially as it pertains to citizen challenges to the abuse of governmental power, American jurisprudence has become a Potemkin village, with a set of "official" laws for the unwashed masses to see ... and a different set of laws the late Judge Arnold called "underground" law[1]: the law courts **really** apply when your life is on the line.

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[1] Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 225 (1999).

ARGUMENT

I. "NO MAN CAN BE JUDGE IN HIS OWN CAUSE."

Appellant Ken Smith is a 48-year-old law school graduate, who satisfied all objective requirements for admission to the Colorado bar. Prior to attending law school, he was a Certified Public Accountant who earned a master's degree in taxation. Smith graduated in the top quarter of his class, passed the bar examination with flying colors, serves as a Republican precinct chair, and amassed a 30-year record of solid, law-abiding citizenship. Yet, after a four-year delay in the processing of his application, he was summarily denied admission to the Colorado bar without a formal hearing, an opportunity to present evidence on his behalf, or even so much as one single word of explanation.

While no one would seriously argue that Smith has a constitutional right to a law license, it is established beyond doubt that he has an absolute right to fair process. *Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).* But unless this 'right' can be vindicated in a court, it does not exist. *Marbury v. Madison, 5 U.S. 137 (1803).*

Accordingly, Smith filed actions in federal and state court, alleging that the Colorado bar admission statute was void for vagueness, and lacked basic procedural safeguards required by the Due Process Clause. He further alleged that the named defendants violated his right to procedural due process in connection with his application, under the theory of law espoused by this Court in *Carey v. Piphus, 435 U.S. 247 (1978).* Smith named the justices of the Colorado Supreme Court as defendants in their personal capacities

under a negligent supervision theory, *Woodward v. City of Worland, 977 F.2d 1392 (10th Cir. 1992)*, as judicial immunity would be unavailable. *Forrester v. White, 484 U.S. 219 (1988)* (for purposes of immunity law, supervision is an administrative activity).[2]

Smith's complaint made its way to the District Court for the City and County of Denver, where it was dismissed for putative lack of jurisdiction. He then appealed to the Colorado Court of Appeals, as the hearing of an initial appeal of a state district court judgment is its statutory province.[3] *C.R.S. § 13-4-102(1).* The justices of the Colorado Supreme Court proceeded to arrogate jurisdiction unto themselves, and affirmed the dismissal.

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[2] The justices were also sued on grounds that Colorado's bar admission process was insufficiently judicial to warrant a grant of immunity, based on an analysis of the six *Butz* factors as applied in *Cleavinger v. Saxner, 474 U.S. 193 (1985).* Specifically, it is alleged that the Bar Committee has no body of precedent to work from, there are no safeguards such as interlocutory review by an independent court to control unconstitutional conduct, and no enforceable right to an appeal. Moreover, decisions of the Colorado Bar have notorious political overtones, such as the case of **the cocaine-dealing convicted felon daughter of a Democratic Party activist and judge receiving a license,** Steve Garnaas,"Police Blast Adams DA Felon Hired As Prosecutor," *Denver Post,* July 15, 1997, at B1, and the summary denial of an application of a Republican candidate for the state House of Representatives two days after his bid for election officially failed. *Application of Leonard Alford Thomas, No. LX98-23 (Colo. Nov. 9, 2000).* The justices named as defendants were appointed to their posts by Democrat governors.

[3] With specifically enumerated exceptions (e.g., matters involving water rights) irrelevant to this case.

A. As Eighteen Other Judges Could Hear This Case Under Colorado Statute, The Colorado Supreme Court's Judgment Is Void As A Matter Of Law

1. General Rule: A Judge With A Personal Financial Interest In A Case Must Recuse Him/Herself

It "certainly violates the Fourteenth Amendment ... to subject [a man's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio, 273 U.S. at 523.* The test this Court has consistently used in determining whether a judge has an interest in a case sufficient to disqualify him from consideration of an appeal is "whether the 'situation is one 'which would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear, and true.'" *Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986) (citations omitted).* Given that Smith has been denied the right to practice law in the state of Colorado for some ten years, which he claims is a direct consequence of the Appellees' serial violations of his right to procedural due process, compensatory and punitive damages on the order of $20,000,000[4] would not be out of the realm of possibility. If that is not a "direct, personal, substantial, pecuniary interest" in his case mandating a judge's recusal, then one does not exist.

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[4] Assuming compensatory damages for injury to reputation and loss of earnings, and the maximum in punitive damages as permitted under the Constitution, the figure could actually be higher.

Colorado law goes even further, placing an affirmative obligation upon judges to recuse: "Any judge who knows of circumstances which shall disqualify him in a case **shall, on his own motion,** disqualify himself." *C.R.S. § 16-6-201(2) (emphasis supplied).* As the Appellants in this case acknowledged the existence of such circumstances, *Smith v. Mullarkey, 121 P.3d at 891 and n. 1,* their conduct in even hearing the appeal -- irrespective of how they ruled -- is in facial violation of both the statute and the federal constitution. *Carey, supra.*

Under Colorado law, once a judge is obligated to recuse himself, he immediately loses all jurisdiction in the matter except to transfer the case. *Erbaugh v. People, 140 P. 188, 190 (Colo. 1914)).* Likewise, a judgment rendered in the face of a jurisdictional defect is void as a matter of law. *Davidson Chevrolet v. City and County of Denver, 330 P.2d 1116 (Colo. 1958).* As such, the 'judgment' issued by the Colorado Supreme Court in this case is void, unless it falls within the ambit of a constitutionally recognized exception to the rule.

2. The "Rule Of Necessity" Cannot Apply Where Other Judges Are Authorized By Statute To Hear A Case

The only exception to the iron-clad rule that a judge may not hear a case in which he has a direct personal financial interest is the "Rule of Necessity," empowering a judge to hear a case when the "'failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated.'" *United States v. Will, 449 U.S. 200, 214 (1980) (internal*

quotation omitted). While not explicitly addressing application of the Rule, the *Will* Court outlined its well-known contours:

> The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest -- where no provision is made for calling another in, or where no one else can take his place -- it is his duty to hear and decide, however disagreeable it may be.

Will, 449 U.S. at 214 (quotation omitted).

Judges of the Colorado Court of Appeals may "serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court," *C.R.S. § 13-4-101.* And in Colorado, "any state court" apparently **means** "any state court."[5] Since eighteen

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[5] As the Colorado Supreme Court recently explained:

> The court has a fundamental responsibility to interpret statutes in a way that gives effect to the General Assembly's intent in enacting that particular statute. Such is best achieved by looking at the language of the statute and giving the words their plain and ordinary meaning. If the statutory language unambiguously sets forth the legislative intent, other rules of statutory interpretation need not be employed. It is essential that courts refrain from rendering opinions that are inconsistent with the legislative intent. Therefore, courts must construe the statute as a whole in order to give "consistent, harmonious and sensible effect to all its parts."

Carlson v. Ferris, 85 P.3d 504, 508 (Colo. 2003) (citations omitted).

judges who are independent[6] with respect to this matter could hear this case in accordance with Colorado law, no "necessity" exists, and the Colorado Supreme Court's action in this case violates the Due Process Clause.

3. The Justices Of The Colorado Supreme Court Did Not Even Have Subject-Matter Jurisdiction Over This Case.

Finally, it must be restated that the Colorado Supreme Court purported to decide an initial appeal of a state district court judgment. Proper appellate jurisdiction over the appeal lies with the Court of Appeals pursuant to C.R.S. § 13-4-102(1), which states in pertinent part: "Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts." There are no grey areas, and the Colorado Supreme Court may not expand its own jurisdiction by rule of court. *People ex rel. City of Aurora v. Smith, 424 P.2d 772 (Colo. 1967).* Accordingly, what the Colorado Supreme Court attempted to do in this case is

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503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there," collecting cases spanning two centuries).

[6] While Justice Coats was not named as a defendant in his personal capacity, his independence as a jurist is fatally compromised by the fact that he may be called upon to rule against a colleague. *Cleavinger, 474 U.S. at 204* (obvious pressure to resolve dispute in favor of the institution and a fellow employee is "hardly conducive to a truly adjudicatory performance").

void ab initio. *People v. District Court, 560 P.2d 828 (Colo. 1977); In re Marriage of Stroud, 631 P.2d 168, 170 (Colo. 1981)* ("[A] court must have jurisdiction over the parties and the subject matter of the issue to be decided if its judgment is to be valid.").

If the Colorado Supreme Court is to live up to its fundamental responsibility "to interpret statutes in a way that gives effect to the General Assembly's intent in enacting that particular statute," *Carlson, 85 P.3d at 508,* it had a duty to remand this matter to the Court of Appeals. The court can only interpret statutes -- not rewrite them. *Colo. Const. art. 3.*

II. COLORADO'S DISTRICT COURTS HAVE A DUTY TO HEAR FEDERAL CLAIMS PROPERLY BEFORE THEM -- AND THE WILLFUL REFUSAL TO DO SO CONSTITUTES TREASON.

As two separate courts acknowledged in writing, *Exh. B at 3-4; Exh. D at 1,* Smith filed a timely complaint in state district court alleging two relevant classes of claims: those alleging violations of federal rights committed by persons acting under color of state law, and facial challenges to the constitutionality of Colo.R.Civ.P. 201 grounded in federal law. Accordingly, he had an absolute constitutional right to have those federal claims heard in a Colorado court. *Claflin, supra.*

In turn, this imposes a concomitant duty upon the judge that is not lightly disclaimed. When a civil claim is properly presented to a Colorado trial court, it has both a right and the duty to adjudicate and determine it -- and any attempt to

take that right and duty away is null and void. *People v. Western Union Tel. Co., 198 P. 146, 149 (Colo. 1921).*[7] Chief Justice Marshall went a step further, describing a judge's willful refusal to take jurisdiction over a case he had a duty to hear as "treason to the constitution." *Cohens v. Virginia, 16 U.S. 264, 404 (1821) (emphasis supplied).*

A. A Colorado District Court Is The Proper Forum For Adjudication Of Claims Grounded In Federal Law.

In the very year that Colorado became a state, this Court established conclusively that state courts had jurisdiction to decide federal claims properly brought before them, stating that "rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts or in the State courts, competent to decide rights of the like character and class." *Claflin, 93 U.S. at 136-37.*[8] While this Court has never compelled a state to create a forum in which valid federal claims must be heard, *Howlett v. Rose, 496 U.S. 356, 371 (1990),* the existence of jurisdiction "creates an implication of duty to exercise it." *Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 58 (1912).* Accordingly, the only open question is whether a

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[7] Although jurisdiction may be limited by the legislature, no statute will be held to so limit court power unless the limitation is explicit. *People ex rel. Cruz v. Morley, 234 P. 178 (Colo. 1967).* However, as no such statute is alleged to exist, there is no need to determine to what extent the Colorado legislature could divest the district courts of jurisdiction.

[8] With the exception of those instances where Congress gave exclusive jurisdiction to the federal courts (irrelevant to this case). *Claflin, 93 U.S. at 137.*

Colorado district court is 'competent' to hear a federal civil rights claim.

The Colorado constitution explicitly designated its state district courts as courts of general jurisdiction:

> The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law.

Colo. Const. art. 9, § 1.

By stark contrast, "[t]he [Colorado] supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only."[9] *Colo. Const. art. 6, § 2(1).* It has no other judicial powers, and cannot expand its own jurisdiction by rule of court. *People ex rel. City of Aurora v. Smith, supra.* Further, "[i]t is likewise clear from these provisions that the jurisdiction of both courts being created by the Constitution, the jurisdiction of each was necessarily excluded from the other."*Friesen v. People ex rel. Fletcher,*

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[9] The only "original jurisdiction" that the Colorado Supreme Court has involves the issuance of extraordinary writs, *Colo. Const. art. 6, § 3; Lucas v. District Court, 345 P.2d 1064 (Colo. 1959),* and no one has authority to expand that power. *Leppel v. District Court, 78 P. 682 (Colo. 1904).* It has an express authority to promulgate rules governing court procedure and administration. *Colo. Const., art. 6, § 21.* It exercises "general superintending control over all inferior courts," *Id., art. 6, § 2(1),* and can give advisory opinions to the executive and legislative branches. *Id., art. 6, § 3.* It has no other powers. Period.

192 P.2d 430, 432 (Colo. 1948). Accordingly, Smith's claim must either be heard by a state district court or the state's supreme court.

Article VI, Section 9 of the Colorado Constitution "confers general jurisdiction upon [its] district courts, with original jurisdiction in all civil, probate, and criminal cases. This jurisdiction extends to cases involving federal rights, even when there is no governing Colorado authority." *Telluride Co. v. Varley, 934 P.2d 888, 890 (Colo. App. 1997) (citation omitted).* In fact, Colorado district courts hear federal civil rights claims on a routine basis. *See, e.g., Boulder Valley Sch. Dist. R-02 v. Price, 805 P.2d 1085 (Colo. 1991).* As such, Smith is entitled to have his claim heard in a state district court, and the decision below constitutes plain error. *See, Howlett, 496 U.S. at 375-81.*

III. THE DOCTRINE OF STARE DECEASED: A REVERSE-*ANASTASOFF* PROBLEM

The case presently before this Court was originally filed as a pendent action, which naturally begs the question of why this matter wasn't heard in federal district court where it belonged. The key to the answer lies in this Court's holding in *Feldman*:

> The remaining allegations in the complaints, however, involve a general attack on the constitutionality of Rule 461 (b)(3). ... The respondents' claims that the rule is unconstitutional [because certain conditions are alleged] do not require review of a judicial decision in a particular case. The District

> Court, therefore, has subject-matter jurisdiction over these elements of the respondents' complaints.

District of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 487 (1980) (internal citation omitted).

While *Feldman* holds that direct challenges to a decision by a state court cannot be heard in a federal district court, it also holds that facial challenges to a bar admission statute must be heard there. In light of that crystal clear holding, the Tenth Circuit's admission is astounding:

> ...[Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights. **Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...**

Smith v. Mullarkey, 67 Fed.Appx. 535, slip op. at 4 (10th Cir. Jun. 11, 2003) (emphasis added).

It is the simplest syllogism in the world: If condition X (an applicant challenges the facial constitutionality of a bar admission rule) is true, then Y (a federal district court must hear his claim, by virtue of *Feldman*). Condition X is true (a fact the Tenth Circuit openly admitted in the highlighted text). Therefore, Y (a federal district court must hear that claim).

On account of his admission, it is beyond dispute that Tenth Circuit Judge Stephen H. Anderson, who entered the decision for that court, knew that Smith was advancing

facial challenges to Colorado's bar admission process, and that the federal courts had jurisdiction over those claims by virtue of this Court's decision in *Feldman*. And surely, this learned gentleman knew that it remains "[the Supreme Court's] prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).* Quite apart from the merits of the constitutional question Smith raises, this was plain error. *See, Roper, 553 U.S. at ___, Scalia slip op. at 2 (dissenting opinion).*

This, in turn, raises the question originally raised by the late Judge Richard Arnold in *Anastasoff*[10]: Does the Article III judicial power grant judges authority to write "designer law," applicable to one and only one set of litigants? Or in the context of this case, as seen from the perspective of the aggrieved citizen, do the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment compel state court judges to follow the authoritative pronouncements of this and other superior courts, **or do judges only have to follow "binding precedent" when it takes them where they want to go?**

A. Binding Precedent: Command Or Suggestion?

In his confirmation hearing, Chief Justice Roberts spoke forcefully about the need to follow precedent, and more to the point, so-called "precedent on precedent." And at least as it applies to this matter, applicable "precedent on precedent" is quite clear: "Caselaw on point is the law," *Hart v.*

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[10]*Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot, Anastasoff v. United States, 223 F.3d 1054 (8th Cir. 2000) (en banc).*

Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001), which lower courts are bound to follow. *In re Smith, 10 F.3d 723 (10th Cir. 1993)*. But in the courts of Colorado, that and a dollar won't even buy you a latte at Starbucks.

First, Smith brought his claims to federal district court, where he had a right to have them heard pursuant to *Feldman* and *Carey*. But the court refused to follow those cases, and an appellate panel willfully refused to correct that plain error. Then, he took the exact same claims to Colorado's courts, where he had a right to have them heard under *Claflin*. But there, he wasn't just denied access to the courts -- he was willfully denied access to the courts by the defendants in his case, in clear defiance of *Tumey*. This isn't just plain error, but brazenly felonious conduct on the judges' part -- punishable by up to ten years in prison. *18 U.S.C. § 241-42.*

Smith came to our courts with the seemingly reasonable expectation that the laws of this great nation, as written by our elected representatives and authoritatively explained in the decisions of this Court, would be faithfully applied to the facts of his case by judges who swore a solemn oath to do precisely that. *E.g., 28 U.S.C. § 453.* Yet, despite all the redundancies and safeguards built into our system, not one but **four separate courts deliberately, intentionally, and repeatedly defied the law of our land,** running roughshod over a stunning array of binding precedents.

Judicial misconduct like this makes a mockery of our system of jurisprudence, where judges are supposed to be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that

comes before them." *Roper, 543 U.S. at ___, Scalia slip op. at 1 (dissenting opinion; quoting The Federalist No. 78, p. 471 (C. Rossiter ed. 1961)).* Rogue judges like Judge Anderson do it because they know they can get away with it: Peer review of judicial misconduct is a joke,[11] impeachment is a farce, government prosecutors are too busy prostrating themselves before the bench to ever dare indict a judge,[12] and the organized bar is absurdly obsequious.[13] As Judge Alex Kozinski of the Ninth Circuit put it, "[i]t is the cold logic of the marketplace that conduct that is rewarded will be repeated." *Pincay v. Andrews, 389 F.3d 853, 863 (9th Cir. 2004) (en banc) (Kozinski, J., dissenting).*

In his confirmation hearing, Justice Alito declared that "no person in this country, no matter how high or powerful, is above the law, and no person in this country is beneath the law."[14] But in the real world, nothing could be further from the truth: In 21st-century America, judges openly commit felonies with impunity, while lowly citizens like Smith

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[11] *See, e.g.,* Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 Mich. L.R. 609, 621 (1990) *available at* http://anthonydamato.law.northwestern.edu/Adobefiles/A90n.pdf.

[12] Carl T. Bogus, Culture of Quiescence, *9 Roger Williams U.L. Rev.* 351, 352 (2004).

[13] By way of example, Ninth Circuit Judge Stephen Barnett suggests that California lawyers, knowing of the strong opposition to the abolition of nonpublication rules held by judges in that Circuit, "may have wanted to 'please the court' by stating their opposition to the rules, while those who favor it are choosing to remain silent rather than 'disappoint the judges before whom they practice.'" *Mauro, infra. n. 24.*

[14] Transcript (unofficial), U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, Jan. 9, 2006, available at washingtonpost.com (copy on file).

are so far beneath the law that the courthouse door is permanently closed to them. Indeed, the last time this Court has sanctioned this sorry state of affairs was in *Dred Scott v. Sandford, 60 U.S. 393 (1857),* wherein it declared that 'niggers were property.'

IV. THE GRANT OF A WRIT WILL BE IN AID OF THIS COURT'S APPELLATE JURISDICTION

This Court hears less than one hundred cases per year, under the presumption that it has to make sure that it gets every one of them just right ... because every other court in the land -- and every citizen -- is relying on it for guidance. But if this Court is no longer willing to insist that our lower courts follow its dictates, its Herculean efforts are a staggering waste of your time (and our money). But more to the point, if we citizens can no longer reasonably rely on its pronouncements as an authoritative statement of what "the law" is, there is no "rule of law" left to preserve.

At the heart of this controversy, lying just under the surface, is the question everyone expects the Roberts Court to answer: "What kind of judiciary are we going to have?" Is it the one envisioned by Alexander Hamilton -- one that is content to interpret the laws, and which follows precedent consistently -- or some unelected and unaccountable superlegislature, which regards the laws passed by Congress as mere advice, and only follows precedent when it takes them where it wants to go?

A. The Public Good Requires This Court To Enforce Its Own Binding Precedent

As arbitrary discretion is the mortal enemy of the rule of law, a judge's fidelity to precedent is essential to the preservation of our personal liberties. Alexander Hamilton wrote, "[to] avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them.[15] Blackstone noted that a judge's duty to follow precedent was derived from the nature of the judicial power itself: a judge is "sworn to determine, not according to his own judgments, but according to the known laws." *1 William Blackstone, Commentaries *69 (1765).* A century earlier, Lord Coke observed, "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion." *1 E. Coke, Institutes of the Laws of England 51 (1642).* As in all but the most exotic cases, the law already has been established, the judge is envisioned as little more than an administrator, playing what Professor Llewellyn called "the game of matching cases." *Karl N. Llewellyn, The Bramble Bush 49 (1960).*

The virtue to society of *stare decisis* goes far beyond the temporal assurance that individual litigants were treated fairly. The rule of law thus expressed furnishes "a clear guide for the conduct of individuals, to enable them to plan

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[15] The Federalist No. 78 (Alexander Hamilton), Independent Journal, Jun. 14, 1788, reprinted at http://www.constitution.org/fed/federa78.htm (visited May 5, 2004).

their affairs with assurance against untoward surprise," streamlines adjudication by obviating the need to constantly relitigate recurring issues, and bolsters public faith in the judiciary as "a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).* Significant uncertainty in the application of the law impairs everyone's liberties, for when "one must guess what conduct or utterances may lose him his position, one necessarily will 'steer far wider of the unlawful zone,'" *Speiser v. Randall, 357 U.S. 513, 526 (1958),* as "the value of a sword of Damocles is that it hangs -- not that it drops." *Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).* Or, as Justice O'Connor put it, "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 844 (1992).* As such, it is not without cause that Justice Story observed:

> A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself [what the law is], without reference to the settled course of antecedent principles.

Anastasoff, 223 F.3d at 904 (citation omitted).

Whether it is a matter of judges being sloppy, *Wilson v. Layne, 141 F.3d 111, 124 and n. 6 (4th Cir. 1998) (Murnaghan, J., dissenting),* or deliberate misconduct of the kind Smith alleges, investing courts with the power to decide on an ad hoc basis what "the law" is going to be in a given case -- without having to even pay lip service to the settled course of antecedent principles -- is to eradicate the rule of law entirely.

B. On The Death Of *Stare Decisis*

On April 11, 1967, eight Supreme Court justices, led by ultra-liberal activist Chief Justice Warren, staged what could fairly be called a judicial *coup d'état*. In defiance of the clearly expressed will of Congress and every canon of judicial interpretation then known to law, they seized power from the people -- in the simple act of declaring that "every person" really meant "every person except us judges." *Pierson v. Ray, 386 U.S. 547 (1967).*

Suddenly, it no longer mattered what Congress said, or even what it intended. In that instant, our "law" was transformed into an Alice-in-Wonderland world, where words only mean what a judge needs them to mean on that day, at that time. To disregard the plain meaning and intent of a statute without a compelling reason to do so would be, as Justice Sutherland observed a generation before, "to enact a law under the pretense of construing one ... **a flagrant perversion of the judicial power**." *Heiner v. Donnan, 285 U.S. 312, 331 (1932) (emphasis added).* But that is the only description of *Pierson* that can possibly be given.

To appreciate the irredeemably treasonous nature of *Pierson,* one must review the rules courts have used since the dawn of the Republic to interpret statutes enacted by Congress. First among them is the "plain meaning" rule: the presumption that Congress really meant what it said and said what it meant in the text of the statute. *Connecticut Nat'l Bank, supra.* And when the terms of a statute are unambiguous, judicial inquiry is presumptively complete.[16]

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[16]*See, Rubin v. United States, 449 U.S. 424, 430 (1981)* (noting excep-

Justice Cardozo adds that courts may not "pause to consider" whether a better statute might have been written, but are compelled to "take the statute as we find it." *Anderson v. Wilson, 289 U.S. 20, 27 (1933).*

In pertinent part, the ubiquitous Section 1983 is as clear and as unambiguous as any statute anyone could hope to write: "Every person [who does X to Y is liable to Y in tort]." Had Congress intended to exempt state judges from this section, it would have said something to the effect that "This section shall not apply to judges." (A quick search of the House of Representatives' data base reveals that the magic words, "shall not apply," appears in 457 separate statutes in Title 42 alone![17]) As Justice Frankfurter noted, the judge's only legitimate task is "to ascertain the meaning of the words used by the legislature," for to go beyond it, and rewrite a statute to his or her liking, is to "usurp a power our democracy has lodged in its elected legislature."[18]

Where there are legitimate doubts as to what Congress intended, the court is to examine the legislative history of a statute, to ascertain whether the statutory language conveyed their intent. But as Justice Douglas observed in his

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tion for those "rare and exceptional circumstances" where the statute is inconsistent with the purposes of the legislation).

[17] The search engine is available at http://uscode.house.gov/usc.htm; the search parameters were 'shall not apply' (Visited May 10, 2004; query results on file).

[18] Felix Frankfurter, "Some Reflections on the Reading of Statutes" (speech before The Association of the Bar of the City of New York), Mar. 18, 1947, *available at* http://www.criminology.fsu.edu/faculty-/gertz/felixfrankfurter.html) (visited Jun. 22, 2004). This is the separation of powers argument revisited in *Anastasoff, supra.*

Pierson dissent, Congress had clearly intended to abolish the common law rule of absolute judicial immunity in civil rights cases:

> Yet despite the repeated fears of its opponents, and the explicit recognition that the section would subject judges to suit, the section remained as it was proposed: it applied to "any person." There was no exception for members of the judiciary.[19]

Moreover, Section 1983 is a remedial statute, which "should be liberally construed to accomplish the purposes of [its] enactment." *Smietanka v. Indiana Steel Co., 257 U.S. 1, 2 (1921).* Besides, if "bribed judges" were part of the problem, exempting them from civil liability would defeat the purpose of the statute, which was to provide a swift and sure remedy for the liberated slaves (and their Republican supporters) when their civil rights were violated. Accordingly, Section 1983 meant what Congress said and said what Congress meant; if state judges didn't like the outcome, their only *legal* recourse was to petition the legislature. *See, Crooks v. Harrelson, 282 U.S. 55, 60 (1930).*

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[19] *Pierson, 386 U.S. at 563 (Douglas, J. dissenting). See also,* Robert Craig Waters, Judicial Immunity vs. Due Process: When Should a Judge Be Subject to Suit?, *Cato Journal, Vol. 7, No. 2 (Fall 1987), pp. 466-68* (expanding upon Justice Douglas' analysis of Section 1983's legislative history, delving into the predecessor Civil Rights Act of 1866 to demonstrate with further clarity that Congress intended judges to be covered by the Act).

Chief Justice Warren justified his decision by claiming that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."[20] This begs the question as to why Congress would need to make such an indication, given that any law made "under the Authority of the United States, shall be the supreme Law of the Land," *U.S. Const. art. VI, cl. 2.* After all, the drafters of present-day Section 1983 lived in a time when Congress wrote laws to remedy "defects" in the common law, *Munn v. Illinois, 94 U.S. 113, 134 (1876)* -- and judges dutifully interpreted them.[21] The statute was clear, served a remedial purpose, was consistent with the legislative history, and directly addresses the purported problem of "bribed judges" in the Reconstruction South. To require a more explicit statement of intent from a 19th-century legislature is an adventure in absurdity.

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[20] *Pierson v. Ray, 386 U.S. at 554. Waters, supra n. 10 at 467,* notes existence of a conflict between state courts on this issue at the time. *Randall v. Brigham, 74 U.S. 523, 536 (1869),* had left the question open, as judges were not liable in tort "unless perhaps when the acts, palpably in excess of jurisdiction, are done maliciously or corruptly." As an illegal act done by a judge was in excess of his jurisdiction, *see, e.g., Ex parte Virginia, 100 U.S. 339, 348 (1879),* a judge who willfully failed to follow the law was liable in tort. *Bradley v. Fisher, 80 U.S. 335 (1872),* finally settled the issue as it pertained to the scope of common-law judicial immunity, but did not interpret Section 1983.

[21] "I feel almost prudish in reminding lawyers that, under traditional canons of statutory construction, once we discern the plain meaning of the statute that is the end of the matter." Alex Kozinski, "Hunt For Laws' 'True' Meaning Subverts Justice," *Wall Street Journal,* Jan. 31, 1989, *available at* http://notabug.com/kozinski/legislativehistory (visited Jun. 29, 2004).

Pierson was a watershed event in the development of American law, inasmuch as it established that judges were above the law. If a statute said "X," a court could now say that it meant "not X," no matter how clear the statute was and how obvious the intent. The courts now hold a veto power over every legislative act, and can vent their spleen on anyone with complete impunity.

The next essential step in the evisceration of judicial accountability was the advent of the unpublished opinion in circa 1970. It opened brand-new vistas in judicial misconduct and outright corruption, as appellate judges no longer had to concern themselves with such niceties as precedent. As Professor Monroe Freedman, one of the nation's leading scholars on judicial ethics, scolded the appellate bench:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.[22]

The typical unpublished opinion is an appallingly slipshod affair, with legal issues resolved with all the "surgical

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[22] Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 Cardozo L.R. 1313, 1345 (1990) (reprinting excerpt from Prof. Freedman's 1980 speech to a Federal Circuit judicial conference).

precision" of a monkey throwing darts at a dartboard. The most ardent proponent of unpublished opinions, Judge Kozinski, openly admitted that panels in his circuit may issue 150 rulings per three-day session[23] -- that's less than ten minutes per decision! The judges haven't read your briefs; they haven't seen your complaint. And they don't have a clue as to what the facts or legal issues are in your case. Judge Murnaghan of the Fourth Circuit admits

> ...it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, **a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law.**

Wilson, 141 F.3d at 124 and n. 6 (emphasis added).

Judge Kozinski once described unpublished opinions as judicial sausage, unfit for human consumption.[24] This, in turn, begs the question of why any litigant should be forced to consume them.

If we are to remain as a free people, we cannot settle for anything less than first-class justice for all. This necessarily demands that every case must be decided on the true facts, in accordance with established legal principles, as

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[23] Alex Kozinski, Letter (to Judge Samuel A. Alito, Jr), Jan. 16, 2004, p. 5, *available at* http://www.nonpublication.com/kozinskiletter.pdf.

[24] Tony Mauro, "Unpublished Opinions: Inedible Sausage or Crazy Uncle," *Legal Times*, Apr. 12, 2004, *available at* http://www.law.com-/jsp/article.jsp?id=1081348862446 (visited Feb. 9, 2006).

documented in a written opinion binding on future courts. And like any other professional, judges must be held personally liable for willful misconduct on the bench.

While certain judges might prefer that we not know it, this is the law. It is not just the law as implicitly expressed in the Due Process and Equal Protection clauses of our Constitution but part and parcel of a binding treaty, and *jus cogens* international law[25] which all courts are obliged to obey.[26] And our courts must faithfully follow the law, or there *is* no law. Justice Brandeis minced no words:

> Decency, security and liberty alike demand that government officials be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself.

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[25]International Covenant on Civil and Political Rights, art. 3,cl. (3)(b), 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (visited May 13, 2004). On account of its almost universal ratification, it has become *jus cogens* law, giving it a minimum status as federal common law -- thereby overriding common law judicial immunity. *Filartiga v. Pena-Irala, 630 F.3d 876 (2d Cir. 1980).*

[26] *The Paqueete Habana, 175 U.S. 677, 700* (1900) ("international law is part of our law"); *Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804)* (an act of Congress "ought never be construed to violate the law of nations, if any other possible construction remains").

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

This Court has led us down this path to perdition, and it is incumbent upon it to lead us back. The Article III power does not license this or any other court to write legislation under the fraudulent guise of adjudicating a case or controversy, whether it is to apply to one or all.

V. CONCLUSION

In his opening statement during his confirmation hearing, Chief Justice Roberts likened a lawsuit to a baseball game, with judges serving as umpires.[27] In taking jurisdiction over this case, the justices of the Colorado Supreme Court have proclaimed that they have the right to call balls and strikes from left field -- **even though they are players on the field!** But even that transgression pales in comparison to the raw spectacle of judges inventing the law and fabricating 'facts' -- guided by the beacon of personal interest, and restrained only by the crooked cord of discretion.

Distilled to essentials, this case presents a fundamental absurdity: While on its face, the Constitution entitles Ken Smith to due process of law and equal protection under law, he has been denied a forum -- federal or state -- in which to

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[27] "Text of John Roberts' Opening Statement," *Seattle Post-Intelligencer*, Sept. 12, 2005, available at http://seattlepi.nwsource.com (subscription service) (visited Sept. 14, 2005; copy on file).

vindicate those rights. And if the rule of law is to have any meaning, this simply cannot be. As Chief Justice Marshall wrote two centuries ago:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . .

Marbury v. Madison, 5 U.S. at 163.

If the Bill of Rights is to mean anything, every individual must have the right to claim the protection of our laws when he suffers an injury, and to expect that any judge charged with adjudicating that claim will faithfully and impartially apply the law to the facts, in accordance with his or her oath. This is an indispensable predicate to a system of ordered liberty, for without the sword of the law and the shield of the courts, we would all stand defenseless in the face of official lawlessness. Smith therefore prays for issuance of an appropriate writ from this Court remanding this matter for trial in the District Court for the City and County of Denver, and any other remedy it might see fit to bestow.

Respectfully submitted this 13th day of February,

Kenneth L. Smith, *pro se*
23636 Genesee Village Rd.
Golden, Colorado 80401
Tel: (303) 526-5451

EXHIBITS

Decisions/Orders:

A Smith v. Mullarkey, United States District Court, District of Colorado (No. 00-N-2225, Dec. 14, 2001)

B Smith v. Mullarkey, 67 Fed.Appx. 535 (10th Cir. Jun. 11, 2003)

C Smith v. Mullarkey, District Court, City and County of Denver, Colorado (Case No. 02-CV-127, Apr. 9, 2004)

D Order, Smith v. Mullarkey, Colorado Court of Appeals (No. 04-CA-949, Aug. 16, 2005)

E Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005)

Statutes:

F Colorado Revised Statutes § 13-4-102(1) (Lexis 2005)

[Filed U.S. District Court, District of Colorado]
[2001 Dec 14, PM 4:34]
[James R. Manspeaker, Clerk]
[By _____Dep. Clk]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 00-N-2225

KENNETH L. SMITH,

Plaintiff,

v.

MARY J. MULLARKEY, REBECCA LOVE KOURLIS, GREGORY J. HOBBS, JR., ALEX J. MARTINEZ, MICHAEL L. BENDER, and NANCY E. RICE, both personally and in their representative capacities as justices of the COLORADO SUPREME COURT, GREGORY KELLUM SCOTT, in his personal capacity only, NATHAN B. COATS, in his representative capacity as a justice of the Colorado Supreme Court, ALAN K. OGDEN, ; SUSAN B. HARGLEROAD, SHARI FRAUSTO, LES WOODWARD, CARLOS SAMOUR, JAMES COYLE, III, ; LINDA DONNELLY, MELANIE BACKES, et al., both personally and in their representative capacity as agents of the COLORADO BOARD OF LAW EXAMINERS; and JOHN DOES 1-9,

Defendants.

FINAL JUDGMENT

In accordance with the order entered orally in open court on December 14, 2001, and pursuant to Fed. R. Civ. P. 58(2),

1. The following FINAL JUDGMENT is hereby entered:

a. Defendants's[sic] Motion to Dismiss for Lack of Subject Matter Jurisdiction and Alternatively, on Grounds of Absolute Judicial and Quasi-Judicial Immunity (Incorporating Authorities) (#18) filed May 1, 2001, is GRANTED. The court finds there are three bases for this ruling:

(i). The United States District court for this district does not have subject matter jurisdiction over this case because it is a challenge by the plaintiff to a judgment entered in a quasi-judicial adjudicatory proceeding in his case, and is an improper attempt to review that judgment in this court, as opposed to seeking review in the United States Supreme Court.

(ii). The defendants are absolutely immune from the allegations concerning money damages in this lawsuit.

(iii) The Complaint fails to state a claim on which relief can be granted.

b. This case is DISMISSED with prejudice.

2. Defendants shall have their costs upon the proper filing of a Bill of Costs within ten days of this Final Judgment.

Dated this 14 day of December, 2001.

APPROVED BY THE COURT:

/s/
EDWARD W. NOTTINGHAM
United States District Judge

ENTERED FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

By /s/
Stephen P. Ehrlich
Chief Deputy Clerk

[Entered on the docket Dec. 14, 2001]
[James R. Manspeaker, Clerk]
[By ____/unsigned/____]

[Filed United States Court of Appeals Tenth Circuit]
[Jun 11 2003, Patrick Fisher, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KENNETH L. SMITH,

Plaintiff-Appellant,

v.

MARY J. MULLARKEY, personally and in her representative capacity as Justice of the Colorado Supreme Court; REBECCA LOVE KOURLIS, personally and in her representative capacity as Justice of the Colorado Supreme Court; GREGORY J. HOBBS, JR., personally and in his representative capacity as Justice of the Colorado Supreme Court; ALEX J. MARTINEZ, personally and in his representative capacity as Justice of the Colorado Supreme Court; MICHAEL L. BENDER, personally and in his representative capacity as Justice of the Colorado Supreme Court ; NANCY E. RICE, personally and in her representative capacity as Justice of the Colorado Supreme Court; GREGORT KELLUM SCOTT, in his personal capacity only; NATHAN B. COATS, in his representative capacity as Justice of the Colorado Supreme Court; ALAN K. OGDEN, personally and in his representative capacity as agent of the Colorado Board of Law Examiners; SUSAN B. HARGLEROAD, personally and in her representative capacity as agent of the Colorado Board of Law Examiners;

SHARI FRAUSTO, personally and in her representative capacity as agent of the Colorado Board of Law Examiners; LES WOODWARD, personally and in his representative capacity as agent of the Colorado Board of Law Examiners; CARLOS SAMOUR, personally and in his representative capacity as agent of the Colorado Board of Law Examiners; JAMES COYLE, III, personally and in his representative capacity as agent of the Colorado Board of Law Examiners; LINDA DONNELLY, personally and in her representative capacity as agent of the Colorado Board of Law Examiners; MELANIE BACKES, personally and in her representative capacity as agent of the Colorado Board of Law Examiners; and John Does 1-9,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before **BRISCOE, BARRETT,** and **ANDERSON,** Circuit Judges.

After examining the briefs and appellate record, this

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See. Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(g). This case is therefore ordered submitted without oral argument.

Plaintiff Kenneth L. Smith, appearing pro se, appeals from a final judgment entered by the district court dismissing his complaint against defendants, which he brought pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The district court ruled that it did not have subject matter jurisdiction over plaintiff's case. We affirm.

The facts of this case are well known to the parties and will not be repeated at length here. The dispute surrounds plaintiff's application to practice law in the state of Colorado. When plaintiff was ordered to submit to a mental status examination by the Board of Law Examiner's[sic] Hearing Panel, however, plaintiff refused. Primarily because plaintiff refused to submit to that examination, the Hearing Panel recommended to the Colorado Supreme Court that plaintiff's application be denied. After consideration of the record, including plaintiff's application, the Hearing Panel's report and recommendation, plaintiff's exceptions to that report, and the responses filed by the Board of Law Examiners, the Colorado Supreme Court denied plaintiff's application for admission to the State Bar.

Plaintiff did not seek review of that denial with the United States Supreme Court, as he is permitted pursuant to 28 U.S.C. § 1257. Instead, ten months later, plaintiff filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights. Plaintiff sought

declarations that the Colorado bar admission process and certain admissions rules were unconstitutional, as well as money damages "resulting from the wrongful deprivation of [plaintiff's] property interest in the right to practice law." R. Vol. I, doc. 5 at 63.

Defendants moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction and, alternatively, on grounds of absolute judicial and quasi-judicial immunity. The district court granted that motion ruling, inter alia, that "[t]he United States District Court does not have subject matter jurisdiction over this case because it is a challenge by the plaintiff to a judgment entered in a quasi-judicial adjudicatory proceeding in his case, and is an improper attempt to review that judgment in this court, as opposed to seeking review in the United States Supreme Court." *Id.*, doc. 32 at 2. Plaintiff has appealed, disputing the district court's determination that it lacked jurisdiction.[1] We review that determination de novo.

Because federal review of state court judgments may be obtained only in the United States Supreme Court pursuant to 28 U.S.C. § 1257, "[t]he Rooker-Feldman doctrine prohibits a lower federal court from considering

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[1] The district court stated that there were three bases for dismissing plaintiff's complaint: (1) lack of subject matter jurisdiction; (2) absolute immunity; and (3) failure to state a claim on which relief can be granted. Because we agree that the district court lacked subject matter jurisdiction over plaintiff's claims, we do not address plaintiff's arguments concerning the district court's alternative bases for its ruling. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

claims actually decided by a state court, and claims 'inextricably intertwined' with a prior state-court judgment. *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002) (citing *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923); *Dist. Of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 483 n.16 (1983)). Under this doctrine, a party who loses in a state court proceeding is barred "'from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.'" *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1169 (10th Cir. 1998) (quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994)).

In his appeal, plaintiff argues that his federal court complaint includes general constitutional challenges to Colorado state law that fall outside this jurisdictional bar. In an opinion released during the briefing of this appeal, the court discussed the *Rooker-Feldman* doctrine and, most relevant to the appeal, the addressed the contours of the phrase "inextricably intertwined" as it has been articulated by the Supreme Court. *See Kenmen Eng'g*, 314 F.3d at 475-477. In that opinion, the court stated:

> Thus, the Supreme Court has identified two categories of cases that fall outside *Feldman's* 'inextricably intertwined' umbrella. First, under *Feldman*, a party may bring a general constitutional challenge to a state law, provided that: (1) the party does not request that the federal court upset a state-court judgment applying that law against the party, and (2) the prior state-court judgment did not actually decide that the state law at issue was

> facially constitutional. Second, under *Pennzoil* [*Co. v. Texaco, Inc.*, 481 U.S. 1 (1987)], a party may challenge state procedures for enforcement of a judgment, where consideration of the underlying state-court decision is not required.

Id. at 476 (citations and footnote omitted). Noting the difficulty in formulating a "foolproof test" for guiding the courts in deciding the inextricably intertwined question, the court articulated the following inquiry:

> in general we must ask whether the injury alleged by the federal plaintiff resulted from the state court judgment or is distinct from that judgment. Three concepts -- injury, causation, and redressability -- inform this analysis. In other words, we approach the question by asking whether the state-court judgment *caused*, actually and proximately, the *injury* for which the federal-court plaintiff seeks *redress*. If it did, *Rooker-Feldman* deprives the federal court of jurisdiction.

Id. (citations, quotation, and footnote omitted).

Using these principles as a guide, we are convinced that the district court did not have jurisdiction over plaintiff's claims. After a careful reading of plaintiff's complaint, affording him the liberality given to all pro se litigants, we conclude that each of plaintiff's claims is inextricably intertwined with the state court's denial of his application for admission to the state bar; thus, under *Rooker-Feldman,* those claims may not be reviewed by the district courts. Plaintiff's continuing attempts to re-frame

the issues so that his claims fall outside the ambit of *Rooker-Feldman* are unavailing. Despite his protests to the contrary, it is clear that the plaintiff's injury resulted from the state-court judgment, that his complaint in federal court sought only to upset that judgment, and that the resolution of his federal claims necessarily required consideration of the underlying state-court decision. *See Kenmen Eng'g*, 314 F.3d at 476. Accordingly, the district court correctly dismissed plaintiff's complaint for lack of subject matter jurisdiction.

We have reviewed plaintiff's remaining arguments concerning the jurisdictional issue and we conclude that they are without merit. The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

[unsigned]
Stephen H. Anderson
Circuit Judge

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO
Case Number: 02 CV 127, Courtroom 6

PLAINTIFF: KENNETH L. SMITH

DEFENDANT: MARY J. MULLARKEY, REBECCA LOVE KOURLIS, GREGORY J. HOBBS, JR., ALEX J. MARTINEZ, MICHAEL BENDER, AND NANCY RICE et al.

ORDER

This matter comes before the court on the Defendants' Motion to Dismiss and Plaintiff's Motion for a Show Cause Order. The Motion to Dismiss is granted and the Motion for a Show Cause Order is therefore denied as moot.

Plaintiff seeks a review of the decision of the Supreme Court of Colorado denying him a license to practice law in Colorado. This court does not have jurisdiction to entertain such an action.

Case law, both Colorado and Federal, makes it clear that the Supreme Court of the State of Colorado has exclusive jurisdiction over matters involving the licensing of persons to practice law. People v. Buckles, 167 Colo. 64, 453 P.2d 404 (Colo. 1968).

> The Colorado Supreme Court, as part of its inherent and plenary powers, has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public. (Case citations omitted.) The inherent powers of the Colorado Supreme Court include the "exclusive power to admit applicants to the bar of this State; to prescribe the rules to be followed in the discipline of lawyers; and to revoke a license to practice law, or otherwise assess penalties in disciplinary proceedings." (Case citations omitted).

Colorado Supreme Court Grievance Committee v. District Court, 850 P.2d 150, 152 (Colo. 1993)

Colorado Supreme Court Grievance Committee v. District Court, supra, involved an attorney seeking to attack a disciplinary regulation as unconstitutional. The district court found that it had jurisdiction to address the issue raised by the complaint. That ruling was reversed in the following language:

> In our view, a district court lacks subject-matter jurisdiction to entertain a complaint concerning the constitutionality of a disciplinary rule that is at issue in an ongoing disciplinary proceeding because the question of constitutionality is inextricably intertwined with the disciplinary proceeding itself. As such, the constitutional challenges fall within the inherent power and exclusive jurisdiction of the Colorado Supreme Court to regulate, govern, and supervise the practice of law.

(850 P.2d @ 154)

This court concludes that the holding above applies with equal force to a suit attacking the denial of a license to practice.

Plaintiff has, or had depending on the running of any appropriate time period, a right to appeal the decision of the Supreme Court denying the decision of the Supreme Court denying him a license to practice. Case law has outlined that avenue of appeal. In a case factually similar to the instant one the Tenth Circuit Court of Appeals identified the only court to which such an appeal could be taken.

> This action is, in essence, an attempt by Doe to seek review in inferior federal courts of the entire state proceedings, including the order of the Colorado Supreme Court refusing to grant his second application for admission. That function is one reserved exclusively to the United Supreme Court. [Case citations omitted.]

Doe v. Pringle, 550 P.2d 596, 599 (10th Cir. 1976).

This court has neither subject-matter jurisdiction to hear plaintiff's claim nor to review the action taken by the Colorado Supreme Court. The case is dismissed.

Done this 9 day of April, 2004.

BY THE COURT:
/s/ H. Jeffrey Bayless

COLORADO COURT OF APPEALS
ORDER
No. 04CA0949 Trial Court No. 02CV0127

Kenneth L. Smith,

Plaintiff-Appellant,

v.

Mary Mullarkey, et al.,

Defendants-Appellees.

Upon review of the notice of appeal, the briefs, and the record, a division of this court has determined that jurisdiction may lie in the Supreme Court because it appears that the issues raised appellant's brief, a copy of which is attacked, challenge the decision of the Supreme Court of Colorado denying appellant a license to practice law in Colorado. See Colorado Supreme Court Grievance Committee v. District Court, 850 P.2d 150 (Colo. 1993). Appellant also challenges certain rules governing admission to the bar on constitutional and statutory grounds. See C.R.C.P. 201.1 ("Supreme Court exercises jurisdiction over all matters involving the licensing of persons to practice law in the State of Colorado.")

THEREFORE, the case is referred to the Supreme Court with the request that it decide jurisdiction pursuant to § 13-4-110(1)(a), C.R.S. 2004.

BY THE COURT:
[/s/ Chief Judge Davidson]

Dated: 8-16-05 [ccs, enclosures]

SUPREME COURT, STATE OF COLORADO Case No. 05SA238, 2005.CO.0000280< http://www.versuslaw.com> (October 17, 2005) [Format altered slightly]

KENNETH L. SMITH, PLAINTIFF-APPELLANT,

v.

MARY J. MULLARKEY, REBECCA LOVE KOURLIS, GREGORY J. HOBBS, JR., ALEX J. MARTINEZ, MICHAEL L. BENDER, NANCY E. RICE, BOTH PERSONALLY AND IN THEIR REPRESENTATIVE CAPACITIES AS JUSTICES OF THE COLORADO SUPREME COURT; GREGORY KELLAM SCOTT, IN HIS PERSONAL CAPACITY ONLY; NATHAN B. COATS, IN HIS REPRESENTATIVE CAPACITY AS A JUSTICE OF THE COLORADO SUPREME COURT; ALAN K. OGDEN, SUSAN B. HARGLEROAD, SHARI FRAUSTO, LESS WOODWARD, CARLOS SAMOUR, DORIS G. KAPLAN, GARY JACKSON, JAMES COYLE III, LINDA DONNELLY, AND MELANIE BACKES, BOTH PERSONALLY AND IN THEIR REPRESENTATIVE CAPACITIES AS AGENTS OF THE COLORADO BOARD OF LAW EXAMINERS; AND JOHN DOES 1-9. DEFENDANTS-APPELLEES.

Appeal from the District Court, City and County of Denver Hon. H. Jeffrey Bayless, Case No. 02CV127.

Kenneth L. Smith, Pro Se Golden, CO Plaintiff-Appellant. John W. Suthers, Attorney General Friedrick C. Haines, First Assistant Attorney General Denver, CO Attorneys for

Defendants-Appellees.

Per curiam [ORDER AFFIRMED, EN BANC]

This matter is before the court on appeal from the Denver District Court. The district court dismissed the case due to lack of subject matter jurisdiction on April 9, 2004. This appeal was originally filed with the Colorado Court of Appeals. That court filed a request for determination of jurisdiction with the supreme court, and on August 18, 2005, the supreme court assumed jurisdiction over the appeal due to the nature of the issues raised. In this per curiam order, the supreme court*fn1 now affirms the district court's order of April 9, 2004 dismissing the case due to lack of subject matter jurisdiction.

I.

Appellant, Kenneth Smith, was awarded a Juris Doctor degree from the University of Denver College of Law in 1995. He applied for admission to the Colorado Bar in January of 1996. Pursuant to C.R.C.P. 201.7 and 201.9, the executive director of the Board of Law Examiners recommended that an inquiry panel be convened to determine questions of Mr. Smith's mental, moral and ethical qualifications for admission to the Bar. The inquiry panel conducted proceedings and ultimately concluded that probable cause existed to believe that Mr. Smith lacked mental stability, and hence recommended that his admission to the Bar be denied.

Mr. Smith requested a formal hearing under C.R.C.P. 201.10, and such hearing was scheduled for April 19 and 20, 1999. The Board of Law Examiners made a motion to

require Mr. Smith to submit to a mental status examination prior to the hearing, and the hearing panel granted that motion.

Mr. Smith refused to submit to the examination. As a result, the hearing was vacated, and the hearing panel submitted a report to the supreme court on June 30, 1999 concluding that Mr. Smith's application should be denied. The supreme court issued an order denying Mr. Smith's application for admission on January 13, 2000. Mr. Smith did not seek certiorari review of that decision with the United States Supreme Court.

Rather, he filed a series of lawsuits, first in federal district court and then in Denver District Court. In those actions, he challenged the denial of his application for admission under 42 U.S.C. section 1983, as a violation of his First, Fourth and Fourteenth Amendment rights.

The order the Court reviews today is the order of the Denver District Court dismissing all of his claims for lack of subject matter jurisdiction.

The Court affirms that order.

II.

Article VI of the Colorado Constitution grants the Colorado Supreme Court jurisdiction to regulate and control the practice of law in Colorado to protect the public. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822, 823 (Colo. 1982); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 406-07, 312 P.2d 998, 1002-03 (1957). This jurisdiction extends over all matters involving the licensing of persons to practice law in the State of Colorado and is exclusive. C.R.C.P. 201.1; People v. Buckles, 167 Colo. 64, 67, 453 P.2d 404, 405 Colo.

201.9(6)(d). The supreme court, after reviewing the report filed by the hearing panel and any exceptions filed by the applicant, may admit or decline to admit the applicant to the Bar. C.R.C.P. 201.10(2)(e).

An applicant may not circumvent the rules of the supreme court by challenging their constitutionality in a district court. See Colorado Supreme Court Grievance Comm., 850 P.2d at 153. In Colorado Supreme Court Grievance Comm., this court held that the district courts may not exercise subject matter jurisdiction over a civil action if the exercise of such jurisdiction interferes with the inherent power of the Colorado Supreme Court to regulate, govern, and supervise the practice of law. 850 P.2d at 153. Although the context of that case involved an attorney disciplinary proceeding, we nonetheless examined why the district courts lack jurisdiction over constitutional challenges to this court's inherent power to regulate the practice of law. Id. at 154. Reasoning that the question of constitutionality is inextricably intertwined with the proceeding itself, we held that district courts are without subject matter jurisdiction over such claims because the claim falls within the inherent power and exclusive jurisdiction of the Colorado Supreme Court. Id. at 153-54.

Similarly, as relevant to the present case, constitutional challenges to the Bar admission process are inextricably intertwined with the procedural mechanism used to determine Bar admission qualifications. Consequently, such challenges fall squarely within the Colorado Supreme Court's exclusive and inherent power to admit applicants to the Bar of this state. It is therefore evident that the district courts do not have jurisdiction over claims that question the constitutionality of the Bar admissions process.

This conclusion is further compelled by the jurisdiction granted to the district courts by our constitution. Article VI, section 9 of the Colorado Constitution provides, "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law." This prescription confers upon the district courts broad, but not unlimited judicial power. See Meye: v. Lamm, 846 P.2d 862, 869 (Colo. 1993); State Bd. of Cosmetology v. Dist. Court, 187 Colo 175, 177, 530 P.2d 1278, 1279 (1974). The district courts have no jurisdiction over Bar proceedings, including those relating to admission, discipline, and disbarrment, because such proceedings are neither criminal nor civil, but rather sui generis. See People v. Morley, 725 P.2d 510, 514 (Colo. 1986); Higgins v. Owens, 13 P.3d 837, 838 (Colo. App. 2000); Cambiano v. Arkansas State Bd. of Law Examiners, 167 S.W.3d 649, 653 (Ark. 2004); In re Conduct of Albrecht, 42 P.3d 887, 890 n.2 (Or. 2002); In re Evinger, 604 P.2d 844, 845 (Okl. 1979). An applicant may seek review of a final judgment from this court by writ of certiorari to the United States Supreme Court. See 28 U.S.C. Â§ 1257(a) (final judgments rendered by the highest court of a state in which a decision could be had may be reviewed by the United States Supreme Court by writ of certiorari); Doe v. Pringle, 550 F.2d 596, 599 (10th Cir. 1976) (review of Colorado Supreme Court order refusing to grant application for admission to Bar reserved exclusively to the United States Supreme Court). An applicant may not disregard a final judgment of this court by seeking review in an inferior state court. See People ex rel. Attorney

in an inferior state court. See People ex rel. Attorney General v. Richmond, et al., 16 Colo. 274, 279, 26 P. 929, 931 (1891). The Rules Governing Admission to the Bar delineate the ultimate and exclusive procedure to determine an applicant's qualifications for admission. See Colorado Supreme Court Grievance Comm., 850 P.2d at 153. Applicants may not circumvent this process by filing claims in a district court because our rules do not provide for district courts to perform any role in the process. See id. Accordingly, we conclude that district courts are without subject matter jurisdiction to entertain challenges to the application and enforcement of the Rules Governing Admission to the Bar.

III.

Mr. Smith's qualifications for admission were at issue after the inquiry panel found that Mr. Smith previously had abused the legal system and exhibited a lack of candor. The Board of Law Examiners adhered to the Rules Governing Admission to the Bar and ultimately recommended that Mr. Smith's application be denied. The supreme court adopted that recommendation and on January 13, 2000, issued an order denying Mr. Smith's application to the Bar. After the supreme court denied Mr. Smith's application to the Colorado Bar, his path of review was to seek certiorari in the United States Supreme Court. He did not take that path. The Colorado Supreme Court's order denying admission therefore became final when the time for filing a petition for writ of certiorari expired. Although Mr. Smith attempted to challenge that order in Denver District Court, it was already final and no longer subject to review.

Accordingly, the Denver District Court was correct in dismissing the action for lack of subject matter jurisdiction and the court therefore affirms.

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*fn1 The court is the defendant in this action. By operation of the Rule of Necessity, Canon 3 F., if all or a majority of the court has a conflict, the court must nonetheless hear the case.

Colo. Rev. Stat. 13-4-102 (Lexis 2005):

(1) Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts, the probate court of the city and county of Denver, and the juvenile court of the city and county of Denver, except in:

(a) Repealed.

(b) Cases in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional;

(c) Cases concerned with decisions or actions of the public utilities commission;

(d) Water cases involving priorities or adjudications;

(e) Writs of habeas corpus;

(f) Cases appealed from the county court to the district court, as provided in section 13-6-310;

(g) Summary proceedings initiated under articles 1 to 13 of title 1 and article 10 of title 31, C.R.S.;

(h) Cases appealed from the district court granting or denying postconviction relief in a case in which a sentence of death has been imposed.